Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Applications for Consent	)	
to the Transfer of Control of Licenses	)	
Section 214 Authorizations from	)	CC Docket 98-141
	)	
AMERITECH CORPORATION,	)	
Transferor	)	
	)	
to	)	
SBC COMMUNICATIONS INC.,	)	
Transferee	)	

COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. IN OPPOSITION TO THE TRANSFER OF CONTROL

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EXECUTIVE SUMMARY

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") opposes the proposed merger of SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech"). This proposed union of massive incumbent local exchange carriers ("ILECs"), each of whom possesses dominant market power and monopolistic market shares in their home regions, is likely to have a dramatic and adverse impact upon the development of competition in their combined region, while offering little, if any, competitive benefit to the majority of out-of-region consumers. Indeed, SBC acting alone has shown its intent to fight and delay the development of competition throughout its ever-increasing region – there is no reason to expect that a larger SBC would somehow become a kinder, gentler ILEC. Thus, McLeodUSA respectfully submits that the Commission should, after appropriate review of the Hart-Scott-Rodino documents filed by SBC and Ameritech and an evidentiary hearing on the application, ultimately rule that this proposed merger is not in the public interest.

Should the Commission nevertheless decide that this merger can proceed, it should not allow SBC and Ameritech to become a even larger mega-ILEC without imposing strong pro-competitive conditions on the mega-ILEC's operations going forward. Indeed, Clark McLeod, McLeodUSA's founder, chairman, and chief executive officer, recently urged the establishment of such market-opening conditions before a Senate subcommittee reviewing the competitive implications of telecommunications mergers, and members of that subcommittee have subsequently sent letters to both this Commission and the Department of Justice advocating that such conditions be imposed upon large ILECs seeking approval of their mergers. Specifically, McLeodUSA asserts that the only

way in which the proposed union could possibly be found to serve the public interest is if SBC-Ameritech's commitment to the following conditions is made an essential part of merger approval:

1. Elimination of resale restrictions and provision of greater wholesale discounts on resold services and forward-looking, cost-based prices for unbundled network elements.
2. Elimination of operational restrictions on resale that have no technical basis.
3. Elimination of special construction charges when such charges would not be imposed upon the ILEC's own end user customers.
4. Implementation of intraLATA toll dialing parity in all states by February 8, 1999, if not otherwise required to implement dialing parity sooner.
5. Establishment of reasonable prices for directory listings and a mechanism for appealing disputes over such prices to this Commission.
6. Provision of technically feasible combinations of unbundled network elements at forward-looking, cost-based rates.
7. Immediate development of Operational Support Systems that enable competitors to provide service to their end users in parity with the service that SBC-Ameritech provides to its own end users.
8. Submission of *monthly* performance reports.
9. Satisfaction of defined performance standards.
10. Payment of reasonable, yet strict, sanctions for failures to satisfy performance and non-performance related merger conditions.

If the merger is ultimately found to be in the public interest (which McLeodUSA argues should not be the case), only by imposing and enforcing such conditions and effective sanctions can the Commission begin to ensure that the new SBC-Ameritech behemoth would not abuse its market power to the detriment of competitors, such as McLeodUSA, throughout the combined mega-ILEC's region.

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COMMENTS OF
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
IN OPPOSITION TO THE TRANSFER OF CONTROL

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), by undersigned counsel, hereby submits its Comments in opposition to the proposed merger of SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech"). McLeodUSA is a competitive local exchange carrier ("CLEC") operating in ten states in the upper Midwest, three of which (Illinois, Indiana, and Wisconsin) are in the region in which an affiliate of Ameritech Corporation is the dominant incumbent local exchange carrier ("ILEC"). In addition, McLeodUSA operates in Missouri, where an SBC affiliate is a dominant incumbent. McLeodUSA has taken significant steps to offer competitive services to both residential and business customers, using the resale of ILEC Centrex services as the primary platform for its offerings. Moreover, McLeodUSA has deployed over 6,000 miles of its own network facilities, and is in the process of transitioning to offer expanded facilities-based services.

The proposed SBC-Ameritech merger, together with the potential union of Bell Atlantic and GTE, could substantially alter the competitive future of the nation's local exchange markets, as two major local service behemoths would control a sizeable majority of access lines nationwide. Even standing alone, the new SBC-Ameritech would control 54 million access lines – approximately one third of the nation's access lines.[1] For the reasons provided below, the Commission should find that the creation of this behemoth ILEC is contrary to the public interest and the pro-competitive goals of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"). In the alternative, if the Commission will in fact allow the proposed transaction to proceed, it should condition approval upon the most stringent conditions needed to protect competitive developments in the local exchange marketplace, including strict effective enforcement mechanisms for failures to treat the new ILEC's local exchange competitors, such as McLeodUSA, in a fair and nondiscriminatory manner.

I. THE COMMISSION SHOULD REJECT SBC-AMERITECH'S CLAIM THAT THE MERGER WILL ENABLE THEM TO PURSUE A NATIONAL STRATEGY OF LOCAL COMPETITION IN OUT-OF-REGION MARKETS.

A. There is Little Reason to Believe that the New SBC-Ameritech Behemoth Will Compete Out-of-Region for Most Kinds of Customers.

SBC and Ameritech assert that their proposed union will enable the combined companies to pursue a national strategy of entering out-of-region local exchange markets. That claim is not credible, for several reasons.

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[1] SBC already controls over 33 million access lines. SBC Communications, Inc., Form 10-K filed March 13, 1998, "Business Operations," at 5. Ameritech has 20.5 million access lines. Ameritech Corp., Form 10-K filed March 13, 1998, at p. 2. It has been reported that the combined SBC-Ameritech would control half the nation's business lines. *European Regulators Signal Clear Path for SBC-Ameritech Deal*, Dow Jones Online News (July 23, 1998).

As a preliminary matter, SBC and Ameritech assume that in order to compete in an out-of-region local market, a carrier must be so large that it controls one-third of the access lines in the country. If that premise is correct (which it is not), then the logical result of the ILECs' argument is a telecommunications market dominated by two or three mega-ILECs. Indeed, with the proposed merger of Bell Atlantic and GTE, that is precisely where the market would appear to be headed.

The development of such a marketplace would not bode well for local competition. Economic theory indicates that a small number of large companies, each holding a proportionate share of a market, have a greater propensity and incentive to collude. Even if there is not explicit collusion between them, the parties can more easily arrive at tacit mutual non-aggression in such circumstances, as each realizes that attempting to steal customers from the other will prompt destructive retaliation.[2]

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[2] This phenomenon has been clearly articulated by SBC's own economic expert, Prof. Dennis Carlton. He starts by offering the hypothetical of a small town with two gas stations that face no competition and no possibility of future entry, with each selling the same gas with the same capacity and quality of product. He concludes that the stations will not compete:

> Each realizes that it cannot steal customers from its competitor before its competitor can respond. And the competitor will respond because it is more profitable to match the price cut and share the market at a lower price than to permit the price-cutting station to steal market share. Each station should rationally anticipate immediate matching and, therefore, not cut price in the first instance. Cooperative pricing is thus a logical outcome of the "game" without any secret meetings or addition communication.

Carlton, Gertner and Rosenfield, "Communication Among Competitors: Game Theory and Antitrust," 5 Geo. Mason L. Rev. 423, 428 (1997).

Of course, while in the case of two or three mega-ILECs, tacit non-aggression would take the form of a geographical division of markets rather than maintenance of a uniform price, a similar analysis applies.

Even if a mega-ILEC should choose under these circumstances to enter and compete in another's home region, there is no reason to believe that the mega-ILECs will extend itself beyond those markets that are already competitive or becoming so. By contrast, there is a particularly strong reason to believe that the local exchange market for residential and medium and small business customers is one in which mutual non-aggression will prevail among a small number of mega-ILECs. These are market segments in which other competition does not exist. Although it might be easier to get "lost in the mix" of competitors angling for the larger business market in a given region, each mega-ILEC will more readily recognize (and can more readily respond) when its rival ILEC is seeking to draw away small business and residential customers.

The merger may in fact reduce the chance that mega-ILECs will ever compete against each other in markets where there is a lack of significant competition. With the proposed mergers of SBC-Ameritech and Bell Atlantic-GTE, the number of significant ILECs would decrease from six to four, and these transaction may spur further combinations. By countenancing reduction in the number of ILECs, the Commission may simply increase the chances that each ILEC will be content to latch onto its own monopoly market share and avoid comprehensive competitive entry into the home regions of other ILECs.

Local exchange competition between mega-ILECs is therefore likely to occur only in the larger business segment of the market, where other competitors have already made some progress. The mega-ILECs are unlikely to blaze any trails by entering new, relatively untouched segments of the local exchange market. Thus, the "National-Local Strategy" must be viewed as offering little promise for increased competition in those areas that need it most.

Indeed, SBC's own description the "National-Local Strategy" indicates that the analysis provided above is generally accurate. SBC admits that the primary focus of its strategy is attracting "the thousand largest companies in the United States," with a focus upon those companies that have principal offices within SBC's region.[3] But the market for larger business customers, while still dominated by ILECs, is the part of the local exchange market that is in the least need of additional competitors. As the Commission has found, "there are a large number of firms that actually compete or have the potential to compete in this market."[4] Since additional competitors are already more likely to pursue customers in this market, the potential benefit of an additional competitor in this market is not enough to justify the more widespread and certain anticompetitive effects of this merger.[5]

B. SBC Already Possesses the Resources to Compete in Out-of-Region Local Exchange Markets.

SBC is already a corporation of enormous size and geographic reach. Its 1997 revenues were $24.8 billion ($26.8 billion with the addition of SNET's 1997 revenues), and its 1997 operating

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[3] Kahan Aff't,, at ¶ 30. Mr. Kahan adds, "The core of the National-Local Strategy is the conclusion that SBC must develop the capability to compete for the business of large national and global customers both in-region and out-of-region." *Id.* at ¶ 13.

[4] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Dkt. No. 97-211, Memorandum Opinion and Order (rel. Sep. 14, 1998), at ¶ 173.

[5] Admittedly, the "second section" of SBC-Ameritech's National-Local Strategy focuses on smaller businesses and residential customers. Kahan Aff't., at ¶ 31. There is no basis, however, for believing that this is anything more than a long-term objective at best, nor is there any reason to believe that SBC-Ameritech would succeed in such efforts. Again, the speculative benefits of this strategy must be weighed against the clearly anticompetitive implications of the proposed union.

income was over $3 billion.[6] In fact, its revenues and net income are already comparable to the companies with which it claims it must compete: Bell Atlantic ($30 billion/$2.5 billion); GTE ($23 billion/$2.8 billion); France Telecom ($27 billion/$2.5 billion); BellSouth ($21 billion/$3.3 billion); Sprint ($15 billion/$1 billion); and MCI WorldCom ($27 billion/$500 million).[7]

Moreover, SBC and Ameritech fail to make a compelling case that the merger is needed to compete with the very few companies that may be larger in size.[8] Neither Nippon Telephone nor Deutsche Telekom possesses the brand name recognition in the local market that SBC and Ameritech do - a factor the Commission has recognized as essential for a company to be a significant competitor in the local exchange market.[9] And while AT&T has a recognized brand name and exceeds SBC in terms of revenues and income, there is no indication that AT&T has succeeded in winning a substantial local market share in either SBC's or Ameritech's home regions.

With the MCI WorldCom merger, SBC contends, it realized that it had to compete with carriers of significant size for the business of its large corporate customers, both within and without its region.[10] But *SBC alone has already achieved the size of MCI WorldCom.* as its revenues are approximately equal to MCI WorldCom's, and its 1997 net income was higher. Moreover, it has far greater managerial and technical experience in local exchange markets. Thus, there is no sound

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6 SBC Communications, Inc., 1997 Annual Report, at 31.

7 *See* SBC-Ameritech Brief, at 53 n.67.

8 According to the SBC-Ameritech brief, AT&T/TCG has revenues of $51 billion and a net income of $4.6 billion; Nippon Telephone has revenues of $77 billion and a net income of $2.4 billion; and Deutsche Telekom has revenues of $39 billion and a net income of $2 billion.

9 *Bell Atlantic-NYNEX Merger Order*, at ¶¶ 106.

10 Kahan Aff't., at ¶ 10.

reason why SBC could not start on its own today competing with MCI WorldCom and other carriers of similar size.

Moreover, SBC and Ameritech ironically present a powerful argument for why they will have to compete for local business outside its region *even without the merger.* SBC and Ameritech argue that in today's increasingly competitive local markets, if they do not offer out-of-region services to their current large business customers, other competitors will take these customers' in-region business as well.[11] These customers represent the "profitable core" of SBC's business.[12] Despite SBC-Ameritech's cries, this is precisely what the competition should entail – a struggle between carriers to retain customers on the basis of quality service offerings and competitive prices. Yet as SBC-Ameritech explains, "[w]e cannot remain idle while our competitors capture the huge traffic volumes generated by a relatively small number of larger customers."[13] What SBC and Ameritech ignore is that a third alternative to merging or remaining idle exists – competitive entry. Since SBC alone is already comparable in size to the competitors it says are threatening its core business, it is well poised to respond to increasing competition in-region by competing out-of-region, regardless of whether it merges.

C. The "National-Local Strategy" is Fundamentally Flawed.

The underlying premise of SBC's strategy for out-of-region local competition is that large businesses are looking for a single provider for their telecommunications needs. This premise, however, is flawed. As one company official described its strategy for purchasing

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[11] *Id.* at ¶ 10.

[12] SBC-Ameritech Brief, at 49.

[13] Kahan Aff't., at ¶ 13.

telecommunications services, "[w]e are never going to going to give everything to one company. That way, they always want to be nice because they want the rest of your business."[14] Thus, there is no reason to believe that SBC and Ameritech are in danger of losing all of their customers' business to competitors any time soon, even if competitors are snipping away at their monopoly market shares.

Moreover, as this Commission has acknowledged, brand-name recognition is crucial in the local exchange market. The merger will not give SBC-Ameritech significant out-of-region brand-name recognition. In addition, to provide local service to many out-of-region customers, SBC admits that its own facilities will have to be supplemented by "extensive utilization of unbundled network elements, primarily local loops."[15] The SBC-Ameritech behemoth will presumably face the same obstacles that smaller CLECs have in obtaining nondiscriminatory access to such bottleneck facilities. Indeed, if the incumbent LEC regards the new SBC-Ameritech behemoth as a more serious potential competitor, it will have an increased incentive to raise obstacles in the path of its utilization of unbundled network elements.

The promised benefits of this merger are speculative at best, and are greatly outweighed by the anticompetitive implications of creating an SBC-Ameritech behemoth.[16] The Commission

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[14] "Hanging Up on the Bells," Wall Street Journal Sep. 21, 1998, at R13 (quoting Richard A. Smith, Director of Technical and Network Services for Methodist Health Systems).

[15] Kahan Aff't., at ¶ 39.

[16] If the Commission feels further consideration of the anticompetitive implications of this proposed merger is warranted, it should review – and allow interested parties to review – the Hart-Scott-Rodino documents that SBC and Ameritech have filed with the Department of Justice. *See BA/NYNEX Merger Order*, at ¶ 28 (referencing Nov. 22, 1996 letter from the Common Carrier Bureau requiring Bell Atlantic and NYNEX to make approximately 30,000 of the Hart-Scott-Rodino documents available for review pursuant to protective order). Similarly, in light of the competitive

should find therefore that SBC and Ameritech have failed to carry the burden of proving that their proposed union is in the public interest.[17]

II. SBC'S CORPORATE CULTURE IS PLAINLY OPPOSED TO COMPETITIVE ENTRY.

In considering whether approval of the merger will serve the public interest, the Commission should also take into account the corporate culture of SBC – an aggressive culture that has shown a tendency to fight and delay (rather than embrace and assist) the development of competition in its existing monopoly markets. If the SBC mentality expands to Ameritech's operations – a possibility that is far too likely to be ignored – it will be able to extend its "stonewalling" corporate culture to other local exchange markets in a manner that completely frustrates the intent of Congress in passing the Act.

Although SBC may argue that it "is committed from the highest levels of the company to open its local networks to enable others to enter the local exchange telecommunications markets in which SBC operates,"[18] a review of the company's performance in its current home regions indicates otherwise. SBC's ceaseless anticompetitive positioning was perhaps best described by a federal court in rejecting Southwestern Bell Telephone's ("SWBT") appeal of the Texas Public Utility Commission's interconnection arbitration decisions:

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concerns raised by the ILECs' application, McLeodUSA would urge the Commission to consider initiating an evidentiary hearing to adequately scrutinize the competitive implications of the proposed transaction.

[17] *Id.* at ¶ 36 ("[T]he Applicants had the burden of demonstrating that the transaction served the public interest.")

[18] Carter Aff't., at 3.

> SWBT's penchant for rehashing issues that had already been fully briefed, raising arguments and claims that did not appear in even the most generous reading of the Amended Complaint, and most, importantly, taking positions in this litigation that it had expressly disavowed in the PUC administrative hearing, were, to say the least, distressing. The voluminous briefing in this case -- over seven hundred pages in total -- could probably have been cut in half had SWBT *not fought tooth and nail for every single obviously non-meritorious point.*[19]

McLeodUSA's experiences in dealing with SBC's affiliate in Missouri are no different. SWBT currently has in place in Missouri a tariff restriction that is aimed at inhibiting the resale of Centrex services by carriers such as McLeodUSA. Interestingly (but not surprisingly), this restriction is virtually identical to the Texas "continuous property" restriction that this Commission deemed anticompetitive and unlawful pursuant to section 253 in its *Texas Preemption Order.*[20] SWBT's adherence to this discriminatory resale restriction – even after the Commission invalidated a similar restriction last year in Texas – demonstrates a complete disregard for the Commission's rulings and an intent to evade whenever possible compliance with the pro-competitive provisions of federal law. The fact that SBC enforces this restriction in Missouri rather than in Texas does not change the fact that the restriction discriminates against resellers, and such action makes all the more clear that SBC will take every opportunity it can to slow or stop competitive entry.

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[19] *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc., et al.*, No. A 97-CA-132 SS, Order, at 31 (W.D. Tex., August 31, 1998) (emphasis added).

[20] *Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCB Pol 96-13, 96-14, 96-16, 96-19, 13 FCC Rcd 3460, 3563 (1997), at ¶ 222.

The statutory goal of opening the local exchange marketplace to competition and making available to consumers a choice of local telephone service providers would be realized more rapidly if new entrants could devote their resources to the necessary tasks of entry – deploying facilities and developing new service offerings. Unfortunately, as in the case of McLeodUSA's experience in Missouri, it appears that the more local markets that SBC controls, the more resources its competitors will need to expend (in jurisdiction after jurisdiction) to defend their statutory rights to enter the local exchange market and obtain access to the incumbent's network. The public interest would be better served by ensuring that SBC's aggressively anticompetitive corporate culture does not further extend its grasp on the nation's monopoly local exchange markets.

III. IF THE COMMISSION ULTIMATELY APPROVES THE MERGER, APPROVAL SHOULD BE CONTINGENT UPON THE IMPOSITION AND IMPLEMENTATION OF STRINGENT, PRO-COMPETITIVE CONDITIONS AND SANCTIONS FOR FAILURE TO MEET THOSE CONDITIONS.

The severe competitive concerns raised by creating a company controlling a third of all the access lines in the country are unlikely to be resolved by approving it subject to conditions such as those set forth in the *BA/NYNEX Merger Order.* Such conditions cannot deter anticompetitive incentives on the part of the mega-ILEC, nor is there any assurance that violations of such conditions can be adequately addressed. For example, there are already charges that Bell Atlantic is failing to comply with the conditions placed upon its merger with NYNEX. As MCI explained earlier this year in a Complaint filed with this Commission, "Bell Atlantic previously failed to comply with the Merger Order, and continues to do so, through its failure to price unbundled network elements based on forward-looking economic costs. . . . Bell Atlantic has now compounded its complete disregard for the critical market-opening provisions in the Commission's Merger Order by refusing to

negotiate in good faith to develop adequate performance standards, remedies, and associated reporting."[21]

Clark McLeod, McLeodUSA's founder, chief executive officer, and chairman of the board, recently testified before a United States Senate Judiciary subcommittee regarding the competitive implications of mergers such as the one proposed here. (A copy of Mr. McLeod's statement to the Antitrust, Business Rights, and Competition Subcommittee of the Senate Judiciary Committee is provided as Attachment A.) Mr. McLeod noted that the ILECs have already proven reluctant in complying with the pro-competitive provisions of the Act, and he emphasized that stringent conditions and enforcement mechanisms need to be attached to mega-ILEC mergers in order to "mitigate the damage done to competition" by these mergers.[22] As a result of the testimony presented by Mr. McLeod and others that day, the subcommittee sent letters to this Commission and to the Department of Justice strongly recommending that if mergers of such large carriers are to be allowed, strong market-opening conditions should be placed upon the entities seeking to merge. (Copies of these letters are provided as Attachments B and C to these Comments.) In that spirit, Mr. McLeod and McLeodUSA therefore suggest that the Commission consider imposing the following conditions upon SBC and Ameritech as part of any approval granted in their merger application:

1. The Commission should require the new SBC-Ameritech to commit to eliminate restrictions on resale and to provide greater wholesale discounts on resold services and prices for unbundled network elements that truly comply with the methodology set forth in the *Local Competition Order*. For example, SBC's operating affiliate continues to impose restrictions on the resale of Centrex in Missouri that are virtually

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[21] Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., File No. E-98-32 (filed Mar. 17, 1998).

[22] Attachment A.

identical to those that were found unlawful buy this Commission in its *Texas Preemption Order.*

2. The Commission should require the new SBC-Ameritech to refrain from imposing operational restrictions that have no technical basis on the services it makes available to competitors for resale.

3. The Commission should require the new SBC-Ameritech to refrain from charging special construction charges to CLECs – or to the CLECs' end users – when such charges would not be charged to the ILEC's own end user customers.

4. The Commission should require the new SBC-Ameritech to provide 1+ intraLATA dialing parity in all states throughout its combined region by no later than February 8, 1999, if not otherwise required to implement dialing parity sooner.

5. Pursuant to the obligation in section 222 of the Act "to provide subscriber list information . . . under nondiscriminatory and reasonable rates, terms, and conditions," the Commission should require the new SBC-Ameritech to lower its price for subscriber list information to no more than a reasonable price for those new entrants who choose to include the publishing of a directory as part of their competitive strategy. For example, while SBC currently charges $0.25 per listing, Ameritech charges $0.13 per listing and BellSouth charges only $0.04 per listing. If there is disagreement over what constitutes a reasonable price, SBC-Ameritech should agree to arbitrate the issue before the Commission. In the interim, the current Ameritech rate should be considered a ceiling.

6. The Commission should require the new SBC-Ameritech to provide technically feasible combinations of network elements at forward-looking cost-based rates. The widespread RBOC intransigence in providing network element combinations has no basis in technology or in economics, and is merely a roadblock the RBOCs have created out of legal fiction to limit competitive entry. As a step toward ensuring that the market is open to competitors, the SBC-Ameritech behemoth should commit to eliminate this patently arbitrary and discriminatory prohibition on combinations throughout its combined region.

7. The Commission should require the new SBC-Ameritech to commit to immediate development of operational support systems ("OSS") that will enable CLECs and other new entrants to provide service to their end users in parity with the service that SBC-Ameritech provides to its end users, including for the resale of Centrex. While McLeodUSA recognizes that the Commission currently has a rulemaking proceeding pending to address the development of OSS, it should be noted that the Commission

first directed ILECs to have electronic interfaces in place by January 1997,[23] and the OSS rulemaking proceeding has been open in some form or another since the Commission first solicited comments on a petition for rulemaking on this issue in June 1997.[24] McLeodUSA respectfully submits that SBC and Ameritech should now have had more than enough time to work through operational issues associated with the implementation of nondiscriminatory OSS.

8. The Commission should also require SBC-Ameritech to submit *monthly* performance reports, in lieu of the quarterly reports required in the context of the BA-NYNEX merger.[25] Since the new SBC-Ameritech would already be compiling data on a monthly basis under the basic BA-NYNEX conditions, it should not be too much of an additional burden to publish those results on a monthly basis as well. By contrast, a span of even three months can make a substantial difference in deciding whether to enter a market or in attempting to withstand the continuing anticompetitive conduct of an incumbent – especially one like the proposed SBC-Ameritech company, which would have a monopolistic level of market share and bottleneck control of essential facilities across such a large span of the nation.

More stringent reporting requirements, however, are only a means to an end. CLECs can measure performance through such reports, but they cannot immediately prevent SBC-Ameritech from acting in a discriminatory and anticompetitive manner even if substandard performance is discovered. The Commission should therefore attach conditions compelling the combined SBC-Ameritech to adhere to certain levels of performance in providing competitors with access to unbundled network elements and resold services. For each reporting category imposed, SBC-Ameritech should be required to meet a certain threshold of performance (whether it be a set interval or a specific success rate) so that carriers can determine with certainty when the mega-ILEC is performing in a substandard manner.

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[23] *Local Competition Order*, at ¶ 525.

[24] *Comments Requested on Petition for Expedited Rulemaking to Establish Reporting Requirements and Performance and Technical Standards for Operations Support Systems*, Public Notice, DA No. 97-211 (rel. June 10, 1997).

[25] *See BA/NYNEX Merger Order*, at Appendix C.1.d.

McLeodUSA recognizes that the Commission tentatively concluded in its Operations Support Systems rulemaking that it would be "premature" to develop performance standards.[26] Only by adopting such standards, however, can the Commission ensure that the reporting requirements provide competitors with obtaining nondiscriminatory treatment from the new SBC-Ameritech behemoth. McLeodUSA also recognizes that the Commission may feel there is not enough evidence on the record to establish sufficiently detailed performance standards. Such uncertainty, however, can be readily addressed by requiring the combined SBC-Ameritech to clearly identify the performance levels and intervals it will in fact provide for itself, and adopt those as default performance standards.[27]

Most significantly, the Commission should ensure that the combined SBC-Ameritech cannot evade compliance with these merger conditions, as Bell Atlantic-NYNEX has apparently done. Thus, the Commission should establish a system of reasonable yet strict financial sanctions for failure to adhere to the performance standards incorporated in the merger conditions. For example, if SBC-Ameritech's performance vis-a-vis a CLEC in any category in which it is required to report falls below the level of performance it provides for its own operations for two consecutive months, the Commission should assess a fine of $75,000 for each month thereafter that the substandard performance in that category continues. The proposed amount of this fine has a sound basis. In the

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[26] *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking (rel. Apr. 17, 1998), at ¶125.

[27] To the extent that the new SBC-Ameritech performs better in the context of its own operations than the level of performance first identified by SBC-Ameritech in establishing the performance standards, SBC-Ameritech should be held to *the higher level of performance.*

Southwestern Bell-AT&T interconnection agreement in Texas, Southwestern Bell has already agreed to pay liquidated damages of between $25,000 and $75,000 in cases where Southwestern Bell's performance falls below a certain measurement level for two consecutive months.[28] Adopting a performance penalty on the high end of that range in the present context would help ensure that there are adequate disincentives to deter the larger, richer, more powerful combined SBC-Ameritech from engaging in anticompetitive conduct.

Moreover, the Commission should create an entirely separate system of penalties to be imposed should the combined SBC-Ameritech fail to meet other, non-performance related merger conditions. In instances in which the new SBC-Ameritech, for example, fails to make combinations of network elements available to competitors or refuses to provide reports on a monthly basis, the Commission should impose a penalty of $500 per day for a continuing violation. As in the case of performance breaches, this amount also has a sound basis; 47 U.S.C. § 502 allows the Commission to impose such a fine for each and every day that a person willingly and knowingly violates any Commission rule, regulation, restriction, or condition. By imposing sanctions for these kinds of violations as well, the Commission can be better assured on a going forward basis that it will not encounter the same kind of compliance problems that have given rise to the MCI Complaint against Bell Atlantic.

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[28] Interconnection Agreement-Texas between Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc., Attachment 17, section 1.1.4.3.

IV. CONCLUSION

For the foregoing reasons, McLeodUSA believes that the proposed union of SBC and Ameritech is not in the public interest. McLeodUSA respectfully requests that if the Commission should in fact approve the proposed union of SBC and Ameritech, it do so only after evidentiary hearing and a review of internal Hart-Scott Rodino documents, and only if SBC and Ameritech agree to adhere to conditions such as those described herein.

Respectfully submitted,

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Dated: October 15, 1998

255614.1

ATTACHMENT A

TESTIMONY OF CLARK McLEOD
U.S. SENATE SUBCOMMITTEE ON ANTITRUST
SEPTEMBER 15, 1998

"Consolidation in the Telecommunications Industry: Has It Gone Too Far?"

Good Morning Mr. Chairman and Members of the Subcommittee

My name is Clark McLeod and I am Chairman and Chief Executive Officer of McLeodUSA. Thank you for giving me the opportunity to testify this morning on the important issue of the increasing consolidation in the telecommunications industry.

McLeodUSA is one of the nation's largest competitive local exchange carriers. We offer local, long distance and other advanced telecommunication services across the upper midwest and Rocky Mountain states. We operate in Indiana, Illinois, Wisconsin, Missouri, Minnesota, Iowa (our base), South Dakota, North Dakota, Colorado and Wyoming. We are also ready, willing and physically and technically able to offer service in Nebraska, Montana, Utah and Idaho, but are being kept out by the Regional Bell. We are somewhat unique amongst the CLECs in that we offer both residential and business service, and target tier 2, 3 and 4 cities.

McLeodUSA started offering local exchange service in 1994, two years before the Telecommunications Act of 1996 was passed. However, this is not our first experience in the telecommunications industry. Most of the senior management team, including myself, were part of a prior company called Teleconnect, which in the 1980s was involved in opening up the long distance market. Teleconnect grew into the fourth largest long distance company in the country. So we have experience in opening up telecommunications markets. Based on that experience, my message to you this morning is that the Act is working; give it sufficient time, together with appropriate enforcement.

Opening markets takes time. Although it is true that the only meaningful competition, in the long run, is facilities-based competition, there are different stages of evolution which a company must go through to get there. Our strategy was to start with resale, build market share, while at the same time building our own facilities (which is a slow, capital-intensive process.) Eventually, we planned to migrate our customer base onto our own facilities, and become a true facilities-based competitor, enjoying sustainable margins. We are currently in the process of doing this. Other CLECs are at different stages in this same process. I sometimes fear that some industry watchers look solely for the final result, facilities-based competition. They see none, and conclude that the Act is not working. Resale was a vital, intermediate step in the opening of the long distance market. It eventually led to facilities based competition. There is good reason to believe that the same will happen in the local exchange market, if sufficient time is given. It is what we did at Teleconnect.

How much time is necessary? I do not know exactly. I do know that megamergers between Regional Bells, like the ones being examined herein, exacerbate the situation, make the Regional Bell monopolists stronger and better able to stonewall competition, and thus require even more time for competition to develop. In addition to more time, more reliable enforcement is necessary to make the mandates of the Act come true.

It is obvious that the Regional Bells will not easily give up their lucrative monopoly profits. That is only rational. Different Regional Bells value the carrot/stick mechanism envisioned by the Act differently. The Regional Bells in the regions in which we operate, being composed largely of sparsely populated states, find the carrot and the required tradeoff insufficient. They find the stick nonexistant.

How should we properly incent these recalcitrant Regional Bells to open up their markets? First, greater empowerment and enforcement of the Act. The stick has been nonexistant. Reenergize the regulatory agencies that enforce the market-opening mandates of the Act, including the antitrust enforcers. The three keys will be 1) Number portability-If customers are to shop for suppliers, they must be able to take their phone numbers with them; 2) Interconnection Parity-If we are going to spend the money to build a new network, my investors need to know we will be able to meaningfully interconnect; and 3) Rigid adherence to the 14-point checklist. Now is not the time to waffle; certainty and resolution are called for.

Second, set strict, objective, measureable and broad-based conditions, market-opening conditions, on the mergers. Maybe we should never have let the Regional Bells merge. There were originally seven; now there will be four. This is a road we probably should never have started down. But if we must accept that we are on that road, then we must create pro-competitive conditions that compensate. My company does not operate in Bell Atlantic's region, so I can be objective. The market-opening conditions that were placed on the Bell Atlantic-NYNEX merger were a good start. Together with stricter and more certain enforcement mechanisms, those conditions could serve as a floor for future conditions on otherwise anti-competitive Regional Bell mergers, in order to mitigate the damage done to competition.

Third, TIME. The Act is working, we should be patient. In my view, ten years may be approximately the realistic time frame to expect true, facilities-based competition to broadly take hold. For example, Teleport began offering local dial tone in New York in the mid 1980s. Today, 13 years later, neither the New York utilities commission nor the FCC has declared that the New York markets are open, though this may be close. If one analogizes opening up the long distance market (which took approximately five years) to paving over the Interstate Highway system, then opening up the local exchange market would be comparable to repaving all the local, dirt and gravel roads in the country, which clearly would take a much longer time. We are on schedule, and with more reliable enforcement we will get there if we stay the course.

ATTACHMENT B

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

September 16, 1998

William Kennard, Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Kennard:

As you know, the Antitrust Subcommittee has been working for some time to promote the effective implementation of the Telecommunications Act of 1996, so that consumers and businesses can reap the benefits of effective competition. As the number and size of mergers in the industry have increased, we are considering whether the market may have fundamentally changed; in the minds of many telecommunications providers, it seems the only avenue to competition in the emerging market for bundled information services is through merger.

Whether that view is correct or not, the pace of consolidation in the industry has reached a point where it is a matter of serious public concern. As always, we count on the Federal Communications Commission to examine each telecom merger with great care, and with an eye toward the competitive effects of the deal. In this regard, we want to encourage you to search for creative, but non-intrusive ways to limit the anti-competitive effects of these deals while emphasizing the pro-competitive aspects. If a merger is justified on the basis of the prospect of increased competition by the merged parties, the FCC should consider how to guarantee that the competitive promises of the merging parties are kept -- without unduly interfering in the legitimate business decisions of the respective companies. In certain circumstances this may be best accomplished by clearly written, easily enforceable conditions for post-merger actions by the parties; in other cases, pre-merger conditions may provide more certainty.

Either way, it is important that the FCC consider all means possible to ensure that any further mergers that may occur in the telecommunications industry do not go forward unless they provide clear and tangible competitive benefits to consumers and businesses.

Finally, as the FCC continues its efforts to examine and evaluate the large number of telecommunications matters before it, we must emphasize the need for speedy resolution of these issues. Both the business community and the public require the certainty that comes with prompt, consistent action by the FCC. Only then can the industry move towards the competitive marketplace structure that we all wish to see.

We look forward to continuing to work with you on these issues and many others.

Very respectfully yours,

MIKE DeWINE
United States Senator

HERB KOHL
United States Senator

STROM THURMOND
United States Senator

PATRICK LEAHY
United States Senator

cc: Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani
Commissioner Harold Furchtgott-Roth

ATTACHMENT C

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

September 16, 1998

Joel Klein
Assistant Attorney General
Antitrust Division
Department of Justice
10th and Constitution Ave.
Washington, D.C. 20530

Dear Mr. Klein:

As you know, the Antitrust Subcommittee has been working for some time to promote the effective implementation of the Telecommunications Act of 1996, so that consumers and businesses can reap the benefits of effective competition. As the number and size of mergers in the industry have increased, we are considering whether the market may have fundamentally changed; in the minds of many telecommunications providers, it seems the only avenue to competition in the emerging market for bundled information services is through merger.

Whether that view is correct or not, the pace of consolidation in the industry has reached a point where it is a matter of serious public concern. As always, we count on the Department of Justice Antitrust Division to examine each telecom merger with great care, and with an eye toward the competitive effects of the deal. In this regard, we want to encourage you to search for creative, but non-intrusive ways to limit the anti-competitive effects of these deals while emphasizing the pro-competitive aspects. If a merger is justified on the basis of the prospect of increased competition by the merged parties, the Antitrust Division should consider how to guarantee that the competitive promises of the merging parties are kept -- without unduly interfering in the legitimate business decisions of the respective companies. In certain circumstances this may be best accomplished by clearly written, easily enforceable conditions for post-merger actions by the parties; in other cases, pre-merger conditions may provide more certainty.

Either way, it is important that the Antitrust Division consider all means possible to ensure that any further mergers that may occur in the telecommunications industry do not go forward unless they provide clear and tangible competitive benefits to consumers and businesses.

We look forward to continuing to work with you on these issues and many others.

Very respectfully yours,

MIKE DeWINE
United States Senator

HERB KOHL
United States Senator

STROM THURMOND
United States Senator

PATRICK LEAHY
United States Senator

CERTIFICATE OF SERVICE

I, Michael R. Romano, do hereby certify that on this 15th day of October, 1998, I served by first-class, United States Postal Service, postage prepaid, a true copy of the foregoing Comments, upon the following:

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* By Hand